

Systemic Racist Police Brutality Shocks the Conscience of Humanity, but is it an International Crime?

by [Margaret deGuzman](#)

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(Editor's note: To mark today's 25th anniversary of the Srebrenica genocide in Bosnia, Just Security is publishing two articles. In addition to this piece by Margaret deGuzman on whether racist police brutality in the United States could be characterized as an international atrocity crime, Just Security is also publishing an [article](#) in which Menachem Z. Rosensaft decries the increasing trend of denying the Srebrenica genocide.)

International crimes are often described as “atrocity crimes” that “shock the conscience of humanity.” The brutal police killing of George Floyd, a crime that is emblematic of so many similar crimes throughout the United States, has catalyzed a global reaction. Protests have taken place [around the world](#), from Germany to Brazil, Tunisia, South Africa, and Hong Kong.

Global leaders have also spoken out against systemic racism in the United States. For instance, the Chairperson of the African Union Commission, [Moussa Faki Mahamat](#), has affirmed “the African Union’s rejection of the continuing discriminatory practices against Black citizens of the United States of America.” [Josep Borrell](#), the EU’s foreign policy chief, said he was “shocked and appalled” by the killing of George Floyd and counseled that “societies must remain vigilant against the excess of use of force.” The United Nations Human Rights Council recently held an [urgent debate](#) on “the current racially inspired human rights violations, systemic racism, police brutality against people of African descent and violence against peaceful protests” in the United States. U.N. Special Rapporteur on racism E. Tendayi Achiume requested the creation of an international commission of inquiry with the necessary authority to investigate systemic racism in law enforcement in the United States (a step she also advocated in a *Just Security* [article](#)).

Despite this international outrage and concern, few are calling Floyd's killing, or other instances of racist police brutality, an international crime. Indeed, while the U.N. Office for the Coordination of Humanitarian Affairs issued an "[atrocity alert](#)" concerning police violence against protesters in the United States, it also stated that "the murder of George Floyd in police custody does not constitute a mass atrocity crime." But is that right? Should Floyd's murder and other instances of racist police brutality in the United States be considered international crimes?

In answering this question, it is useful to distinguish between the moral aspect: whether such crimes ought to be labeled "international" crimes; and the legal one: whether they meet the definitional elements of any existing international crimes. At the same time, the distinction should not be drawn too starkly because moral considerations should factor into decisions about how to interpret and apply legal provisions. I believe there is a strong moral case for labeling racist police brutality in the United States an international crime, and, relatedly, that existing categories of international crimes should be interpreted to reach such conduct. Additionally, although no international court is likely to have jurisdiction over crimes committed in the United States anytime soon, states supportive of global justice should consider exercising universal jurisdiction over such crimes if U.S. courts fail to act.

"Atrocity" Crimes

The label "international crime" is typically associated with crimes that cause massive numbers of deaths, usually in the context of armed conflict or dictatorship. When former U.S. Ambassador for War Crimes Issues, David Scheffer, coined the term "atrocity crime," [what he had in mind](#) was a crime "of significant magnitude, meaning its commission is widespread or systematic or [is] part of a large-scale commission of such crimes." A [U.S. human rights commission](#) conducting a hearing on "accountability for atrocities" focused on "large-scale, deliberate attacks against civilians ..." that "result[] in the suffering and deaths of hundreds of thousands of people." Randle DeFalco has convincingly argued that this focus on crimes of massive suffering reflects a particular aesthetic of international crimes as "[horrific spectacles](#)."

In my recently published [book](#), "Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law," I argue for a broader understanding of

international criminality that does not require large-scale suffering. From a moral perspective, I argue that global prescriptive authority – the authority to prohibit conduct – should extend to all conduct that harms human dignity sufficiently to warrant criminal sanction. Under this account, the murder of George Floyd, and the many other instances of racist police brutality in the United States, surely qualify. Indeed, it may be important to label such conduct international crimes to reflect the global community’s interest in condemning and preventing it, and thereby promoting the dignity of all humans.

This moral theory of international criminality suggests that current categories of international crimes should be expanded. However, such expansion is not necessary to capture racist police brutality in the United States. There are at least two existing categories of international crimes that can be interpreted to include such conduct: torture and crimes against humanity.

Torture

Torture, standing alone, is not within the jurisdiction of international courts like the International Criminal Court (ICC) or the various ad hoc and hybrid international courts and tribunals created in places such as Rwanda, the former Yugoslavia, Cambodia, and Sierra Leone. However, under the [Convention Against Torture](#) (CAT), to which the United States is a party, torture is subject to universal jurisdiction. The CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Few people who watched the video of Derek Chauvin’s knee pressing on George Floyd’s neck for almost nine minutes, ultimately asphyxiating Floyd on the pavement, can doubt that this constituted torture. Numerous other [recent and older](#) instances of police

brutality toward Black victims in the United States also appear to satisfy the CAT's definition of torture. These include, for instance, the police choke hold that killed [Eric Garner](#) and the "rough ride" that killed [Freddie Gray](#). In each of these cases, the police intentionally inflicted "severe pain and suffering" and their purpose went well beyond what can reasonably be associated with the lawful objective of subduing or detaining a crime suspect. As [numerous studies](#) demonstrate, this brutal treatment's purpose is to perpetuate a system of discrimination, intimidation, and coercion that keeps Black Americans from enjoying or gaining social, political, and economic power.

Crimes Against Humanity

The second category of crimes that could potentially be applicable to conduct such as the murder of George Floyd is crimes against humanity, although the argument for this label is more controversial. Crimes against humanity were first defined in the [Charter of the International Military Tribunal at Nuremberg](#) as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Notably, there was no element of large-scale harm in this definition. However, the definition required a connection to another crime in the Tribunal's jurisdiction, all of which related to a state of war. There is evidence that this "war nexus" was included, at least in part, to exclude from the definition of crimes against humanity the racist treatment of minority groups in the United States and Allied colonies (see e.g. William Schabas [here](#) at p. 108).

However, soon after the Nuremberg trials, the war nexus was eliminated from the crime's definition. Modern international instruments, including the [Rome Statute](#) of the ICC and in the International Law Commission's (ILC's) [draft articles](#) on crimes against humanity, define crimes against humanity as one of a number of listed acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." In a departure from other definitions of the crime, these instruments

further define “attack directed against any civilian population” as “a course of conduct involving the multiple commission of [specified] acts ... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” The listed acts include murder, torture, and persecution, including based on race, each of which could form the predicate act for racist police brutality such as that inflicted on George Floyd.

In assessing whether police killings like that of George Floyd constitute crimes against humanity under the definitions above, the most controversial question is whether they form part of a “widespread or systematic attack” that is “in furtherance of a State or organizational policy.” Unlike state organs carrying out genocide or ethnic cleansing, police departments do not have overt policies requiring or encouraging officers to kill, torture, or persecute people based on their race. Instead, such actions are rooted in a system that promotes racist crimes by failing to prevent or punish them – what criminal law calls conduct by omission. The ICC’s [Elements of Crimes](#), which are intended to assist the Court in interpreting and applying the Rome Statute, specify in a footnote that the policy element “may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.” However, the Elements of Crimes also states that: “The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.” It is not clear that the second statement reflects the law of crimes against humanity outside the ICC context, and it is not contained in the ILC’s draft articles or any other formulation of crimes against humanity. However, it is also true that most cases of crimes against humanity have involved policies based in action rather than omission.

Whether murders and other police brutality against Black people and other people of color constitute crimes against humanity therefore depends on whether the crimes are committed in furtherance of a governmental policy of omissions that aims to encourage an ongoing attack against members of these populations in the United States. There is evidence suggesting they are.

The ICC has [identified](#) as relevant criteria for determining the existence of a policy “the scale of the acts of violence perpetrated” and “the general historical circumstances and the overall political background against which the criminal acts are set.” The scale of police brutality against Black people and other people of color in the United States is

enormous. As Michelle Bachelet, U.N. High Commissioner for Human Rights, [stated](#) of Floyd's murder: "This is the latest in a long line of killings of unarmed African Americans by US police officers and members of the public." A 2017 [study](#) published in the *American Journal of Public Health* found that Black men were 2.8 times more likely to have lethal force used on them during police encounters than were their White counterparts. This number was only slightly lower than that found in a study published over a decade earlier. Indeed, as Nawi Ukabiala pointed out in a recent *Just Security* [article](#), a 2015 [study](#) found that "in some parts of the United States, *unarmed* Black people were nearly 20 times more likely to be shot than *armed* White people" during encounters with the police.

The [historical circumstances](#) in which racist police brutality takes place are rooted in the systemic violence of slavery and the ensuing institutional structures built to ensure the continued oppression of Black people and other people of color in the United States. The political background against which such acts currently take place is one of an increasingly dictatorial regime led by a megalomaniac who has overtly espoused [racist ideas and actions](#). The U.S. government also systematically underenforces penalties for crimes affecting Black victims. A recent emblematic example is the killing of [Ahmaud Arbery](#), a Black jogger whose White killers were known but not charged until a video of the crime surfaced. For these reasons, it is reasonable to conclude that the systemic police abuse of people of color in the United States, along with the failure to prevent or punish such abuse, is part of a government policy of persecution of this population. L. Ali Khan recently made a similar argument in [Jurist](#). Relatedly, the Open Society Justice Initiative issued a [report](#) concluding that police brutality in Mexico constitutes a crime against humanity.

A Venue to Prosecute?

Assuming that acts of racist police brutality can fulfill the elements of an existing international crime, be it torture or crimes against humanity, the next question is whether such alleged crimes ought to be adjudicated in either an international court or a national court exercising universal jurisdiction. This too is also both a moral and a legal question.

The best forum for criminal adjudication, both as a moral and legal matter, is often the one where the crimes were committed because it has the closest ties to the evidence, victims, perpetrators, and broader affected communities. This forum can thus often provide the highest quality justice for both victims and defendants. If the perpetrators of racist police brutality are prosecuted and punished in the United States for sufficiently serious crimes, the national interest in local prosecution may supersede any global interest in adjudication. Murder may be a sufficiently serious charge, although it does not capture all of the harms the victims suffer, or the systemic and discriminatory nature of the crimes. Not all states have hate crime legislation. [U.S. legislation](#) criminalizing torture only allows for prosecution of that crime when committed outside U.S. territorial boundaries, and few U.S. states have made torture a crime. Federal legislation prescribing crimes against humanity has been [proposed](#), but has not passed.

Assuming the United States is unwilling or unable adequately to adjudicate acts of racist police brutality, authorities in other legal systems should consider taking action. As a legal matter, the ICC is unlikely to acquire jurisdiction over these crimes since the United States is not a party to the Court, will veto any Security Council referral, and is highly unlikely to agree to an ad hoc grant of jurisdiction. Indeed, at least under the present U.S. administration, any discussion of ICC involvement is fanciful, as demonstrated by the president's recently issued [Executive Order](#) targeting for sanctions a wide array of persons associated with the Court, including those who materially support the Court's efforts related to investigating U.S. citizens.

The possibility of another state exercising universal jurisdiction is also remote, although perhaps not quite as unimaginable. A legal case can be made that a state in whose jurisdiction a perpetrator of racist police brutality is found ought to be tried in that country's courts for torture or crimes against humanity. Indeed, the CAT requires states to either prosecute or extradite persons suspected of torture found on their territories, and a similar provision will likely be included in any future convention on crimes against humanity.

As a moral matter, the exercise of universal jurisdiction over such cases is legitimate in some circumstances. In "Shocking the Conscience," I argue that such jurisdiction should be exercised when the global interest in adjudication outweighs any competing national interests. Here, the global interest is strong: preventing police brutality is a world-wide

priority that could be significantly advanced through prosecution of citizens of one of the world's most powerful states. Relatedly, Ukabiala's *Just Security* [article](#) argues that other countries can and should bring civil proceedings against the United States alleging that it has violated its duties as a member of the CAT by allowing police officers to repeatedly enjoy impunity for committing acts characterizable as torture against Black victims.

Conclusion: Implications for Anti-Racism Activism

The implication of this analysis for those fighting against impunity for acts of racist police brutality include the following: First, organizers in the United States should consider whether current federal and state criminal laws adequately capture the harms this conduct causes. If not, it may be time to advocate strongly for the adoption of criminal prohibitions against torture and crimes against humanity committed in the United States, as well as abroad. Second, allies of this work outside the United States should consider encouraging their governments to investigate and prosecute U.S. police officers found on their territories suspected of having committed crimes of racist police brutality that amount to torture or crimes against humanity. The recent outpouring of support for accountability for perpetrators of such crimes suggests that they truly “shock the conscience of humanity.”

Image: Demonstrators participate in a protest against police brutality on June 14, 2020 in Miami, Florida. (Photo by Joe Raedle/Getty Images)

About the Author(s)

Margaret M. deGuzman

James E. Beasley Professor of Law at Temple University's Beasley School of law and co-director of the Institute for International Law and Public Policy. Follow her on Twitter (@Megdeguzmanprof).